IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EQT PRODUCTION COMPANY, Plaintiff, v. AUSTIN CAPERTON, in his official capacity as Secretary of the West Virginia Department of Environmental Protection, Defendant.	Civil Action No. 1:18-cv-72 Judge Thomas S. Kleeh

MOTION TO STAY JANUARY 30, 2019 BRIEFING SCHEDULE AND RULING ON DEFENDANT'S MOTION TO DISMISS

Plaintiff EQT Production Company ("EQT") respectfully moves this Court to stay this case, including holding in abeyance Defendant Secretary Caperton's deadline to move to dismiss the Amended Complaint, *see* ECF No. 55. As explained more fully below, the preliminarily approved class action settlement in *The Kay Company, LLC et al. v. EQT Production Company, et al*, Case No. 1:13-CV-151 ("*Kay Company*"), also pending in this District, may resolve the payment terms under most or all of EQT's flat-rate leases and could result in EQT's voluntary dismissal of this action.

I. Procedural History

EQT filed a Complaint for Declaratory Relief on April 12, 2018. (ECF No. 1). Secretary Caperton filed a Motion to Dismiss and supporting memorandum on May 31, 2018. (ECF No. 17, 18).

The motion came on for hearing before the Honorable Thomas S. Kleeh on December 10, 2018. During the course of the hearing, EQT stated it would move to amend the complaint to

narrow the issues to be decided. Following the hearing, the Court entered an order allowing EQT until January 11, 2019 to file a motion for leave to file an amended complaint. (ECF No. 51). EQT timely filed its Unopposed Motion for Leave to file an Amended Complaint for Declaratory Relief. (ECF No. 54). On January 30, 2019, the Court granted that unopposed motion, instructed the clerk to docket the Amended Complaint, and set a deadline of February 22, 2019 for Secretary Caperton to file any motion under Rule 12(b) of the Federal Rules of Civil Procedure related to the Amended Complaint or any supplemental briefing in support of any pending motions. (ECF No. 55).

II. Potential Impact of Class Action Settlement

As this Court is aware, the sum and substance of this action is that EQT—as a lessee with respect to many flat-rate leases for the extraction of natural gas—seeks a declaration that West Virginia's Flat-Rate Statute, W. Va. Code § 22-6-8, both as originally enacted and as amended, violates the Contract Clause of the United States Constitution. The payment terms of EQT's flat-rate leases are also at issue in the *Kay Company* action, which is pending in this Court, before the Honorable John Preston Bailey. The *Kay Company* complaint was filed on January 16, 2013 as a putative class action on behalf of natural gas royalty owners alleging, among other things, violations of the Flat-Rate Statute.[1] On September 6, 2017, the Court in *Kay Company* certified a class that was defined, in part, as follows:

> All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their natural gas or mineral estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period.) (See exception below.)

[1] The relevant procedural history of *Kay Company* is recited in the Order Granting Preliminary Approval of Class Settlement, Approving Notice Expert and Administrator, Approving Notice Plan and Notice, Providing a Scheduling Order for Notice and Deadlines for Exclusions and Objections, Directing Notice to the Class and Setting Date for Final Fairness Hearing ("Preliminary Order Approving Class Settlement"). *See Kay Company*, Preliminary Order Approving Class Settlement (ECF No. 747) (attached as Exhibit A).

> Subclass A – All EQT natural gas lessors with flat rate leases converted by operation of W.Va. Code, § 22-6-8 and that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period.).

See Kay Company, Order Resolving Motions (ECF No. 400) at 74–75. Thus, the *Kay Company* class includes all EQT leases subject to the Flat-Rate Statute.

On February 13, 2019, the Court in *Kay Company* entered a preliminary order approving a class settlement of the claims in that action. *See Kay Company*, Preliminary Order Approving Class Settlement (ECF No. 747). If final approval of the settlement is entered, and dependent upon whether and to what extent there are class members who opt out of that settlement, the settlement could resolve the payment terms on all or substantially all of EQT's flat-rate leases, whereupon EQT may seek to voluntarily dismiss this action, which seeks declaratory relief concerning those payment terms.

Accordingly, in view of the recent settlement developments and in the interests of judicial economy, EQT respectfully requests that the Court hold the briefing schedule entered on January 30, 2019 and the adjudication of the motion to dismiss in abeyance until such time as it can be determined whether EQT will seek to voluntarily dismiss the Amended Complaint in this case. On this point, EQT notes that the Preliminary Order Approving Class Settlement in *Kay Company* sets April 2, 2019 as the deadline for class members to opt out of the settlement; May 28, 2019 as the deadline for objections to the settlement; June 13, 2019 as the deadline for EQT to exercise its right to terminate the settlement (if the number of opt-outs exceeds a certain percentage of the class); and July 11, 2019 as the deadline for the final fairness and approval hearing by the Court. *See* Ex. A, at 16. If the *Kay Company* Court grants final approval to the settlement, the deadline

to appeal from that order would be thirty days following the entry of final judgment. *See* Fed. R. App. P. 4(a)(1)(A).

Counsel for EQT has conferred with counsel for Secretary Caperton and advised that depending on the outcome of the settlement and court approval process, EQT may choose to move for voluntary dismissal of this action. Counsel for Secretary Caperton has advised that Secretary Caperton does not intend to object to the present motion seeking a stay of this action in the interim.

III. Conclusion and Relief Requested

WHEREFORE, for the foregoing reasons, EQT moves the Court (a) to stay the February 22, 2019 deadline for Secretary Caperton to file any motion under Rule 12(b) of the Federal Rules of Civil Procedure related to the Amended Complaint or any supplemental briefing in support of any pending motions; (b) hold in abeyance any ruling on the motion to dismiss; and (c) order EQT to file a status report by July 19, 2019. A proposed Order granting the relief requested is attached for the convenience of the Court.

Respectfully submitted,

EQT PRODUCTION COMPANY,

By Counsel:

BABST CALLAND CLEMENTS and ZOMNIR, P.C.

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Dated: February 15, 2019

CERTIFICATE OF SERVICE

I, Timothy M. Miller, do hereby certify that on February 15, 2019, I electronically filed the foregoing **"Motion to Stay January 30, 2019 Briefing Schedule and Ruling on Defendant's Motion to Dismiss"** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

THE KAY COMPANY, LLC,
WILLIAM CATHER, Trustee
of Diana Goff Cather Trusts,
and JAMES E. HAMRIC III,
and all other persons and
entities similarly situated,

Plaintiffs,

v.

Case No. 1:13-CV-151
Honorable John Preston Bailey

EQT PRODUCTION COMPANY,
a Pennsylvania corporation;
EQT CORPORATION,
a Pennsylvania corporation;
EQT ENERGY, LLC, a
Delaware limited liability company;
EQT INVESTMENTS HOLDINGS, LLC, a
Delaware limited liability company,
EQT GATHERING, LLC, a
Delaware limited liability company; and
EQT MIDSTREAM PARTNERS, LP,
a Delaware limited partnership,

Defendants.

ORDER GRANTING PRELIMINARY APPROVAL OF CLASS SETTLEMENT, APPROVING NOTICE EXPERT AND ADMINISTRATOR, APPROVING NOTICE PLAN AND NOTICE, PROVIDING A SCHEDULING ORDER FOR NOTICE AND DEADLINES FOR EXCLUSIONS AND OBJECTIONS, DIRECTING NOTICE TO THE CLASS AND SETTING DATE FOR FINAL FAIRNESS HEARING

Pending before the Court is Plaintiffs' Motion for preliminary approval of Settlement Agreement, and motion to approve and appoint the existing class notice expert and class administrator as settlement class notice expert and settlement administrator, to approve the notice plan and notice prepared and submitted by the settlement notice expert directing notice to be provided to the class pursuant to the above plan by the Settlement Class Administrator and for the Court to schedule dates and deadlines for (a) completing the notice program by the settlement class

administrator, (b) the deadline for class members to file notice of exclusion (opt-outs) and the form and content of said exclusion notice, (c) dates and deadline for class members to file any objections to the settlement agreement and the form and content of same and (d) to set a date and time for the Final Fairness Hearing with regards to the final approval of the settlement agreement and other deadlines and matters relating to the above class action litigation. Defendants, having reviewed plaintiffs' motions regarding preliminary approval and for scheduling, represent that they have no objections thereto.

The Litigation and Settlement Negotiations

1. On January 16, 2013, Plaintiff Class Representatives, by counsel filed their Complaint in Civil Action No. 13-C-2 in the Circuit Court of Doddridge County, West Virginia, against the EQT Defendants seeking, among other things, damages for alleged improper deductions of post-production expenses from their royalty payments and damages for breach of lease agreements, alleged breach of fiduciary duty, alleged fraud, alleged violations of the flat rate royalty statute (W. Va. Code § 22-6-8) and the West Virginia Consumer Credit and Protection Act (W. Va. Code § 46A-6-101, et seq.), and for punitive damages, all related to the alleged improper payment of royalties.

2. EQT removed this case to the United States District Court for the Northern District of West Virginia on May 31, 2013, as Civil Action No. 1:13-CV-151, and filed its answer and asserted affirmative defenses denying liability.

3. Plaintiff Class Representatives filed their Amended Complaint on May 9, 2014, adding various allegations, to which EQT filed another answer and asserted affirmative defenses denying liability.

4. After class discovery, the plaintiffs filed their motion for class certification on September 30, 2016, which the defendants opposed. After briefing by all Parties, the Court found

a class action appropriate under F.R.C.P. 23(b)(3) and ordered that the following class be certified as a F.R.C.P. Rule 23(b)(3) class action on September 6, 2017.[1]

WHEREAS, the Court therefore certified the following classes:

All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their natural gas or mineral estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period.) (See exception below.)

Subclass A - All EQT natural gas lessors with flat rate leases converted by operation of W. Va. Code, § 22-6-8 and that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period.).

Subclass B - All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present (during any time within their leasehold period,) and whose leases do not permit the deduction of post- production expenses under ***Tawney,*** except for those lessors holding flat rate leases converted according to W. Va. Code, §22-6-8.

Subclass C - All EQT natural gas lessors that received or were due to be paid royalties from defendants and EQT's production or sale of natural gas which was produced within the boundaries of the State of West Virginia from their estates during the period beginning after December 8, 2008, and extending to the present

[1] There was excepted from this class those lessors whose lease interests were acquired by EQT in purchases of stock, mergers or asset purchases of Stone Energy, Republic Energy, Trans Energy, and Statoil as set forth more specifically in the transactions set forth below:

a. Purchase and Sale Agreement by and between Statoil USA Onshore Properties, Inc., as seller, and EQT Production Company, as buyer, dated April 20, 2016.
b. Purchase and Sale Agreement by and among Republic Energy Ventures, LLC, Republic Partners VI, LP, Republic Partners VII, LLC, Republic Partners VIII, LLC, and Republic Energy Operating, LLC, collectively as sellers, and EQT Production Company, as buyer, dated October 24, 2016.
c. Agreement and Plan of Merger by and among Trans Energy, Inc., EQT Corporation, and WV Merger Sub, Inc., dated October 24, 2016.
d. Purchase and Sale Agreement by and between Stone Energy Corporation, as seller, EQT Production Company, as buyer, and EQT Corporation, as buyer parent, dated February 9, 2017.

Therefore, the notice will not be sent to those lessors and the published notice and the website will clearly state that the lessors of the above acquired leases are not members of this class.

(during any time within their leasehold period,) and whose leases do permit the deduction of postproduction expenses under ***Tawney,*** except for those lessors holding flat rate leases converted according to W. Va. Code, §22-6-8.

There would be excepted from the class the officers and agents of any defendant or subsidiary of any defendant named in this lawsuit or any lawsuit involving the same or similar claims as those alleged in this lawsuit; any attorney for any such defendant; any attorney for any plaintiff in this lawsuit or in any lawsuit involving the same or similar claims as those alleged in this lawsuit against any such defendant; and any judicial officer who presides over this lawsuit or over any other lawsuit involving the same or similar claims as those alleged in this lawsuit against any such defendant.

5. The Court certified the class and appointed Marvin W. Masters and the Masters Law Firm LC and Michael W. Carey and the law firm of Carey, Scott, Douglas & Kessler, PLLC as Class Counsel and appointed the individual plaintiffs, The Kay Company, LLC, William Cather, Trustee of Diana Goff Cather Trusts and James E. Hamric, III, as class representatives for and on behalf of the Class.

6. The Parties engaged in exhaustive discovery over the five (5) years of litigation up to and including the conclusion of expert depositions on November 20, 2018.[2]

7. The trial of this case was scheduled to begin on November 27, 2018. All pretrial motions were filed, briefed and ruled upon by the date of the Pretrial Conference and Hearing on November 15, 2018, including Defendants' Motions for Summary Judgement filed in August 2018.

8. The parties began preliminary discussions with respect to settlement after the Court ruled on pretrial motions at the pretrial in Wheeling, West Virginia on November 15, 2018.[3] Thereafter the parties scheduled a formal mediation in Pittsburgh, Pennsylvania to occur on November 19, 2018, before Joseph Selep, an experienced trial counsel and mediator of civil

[2] As noted in the official comments to the 2018 amendment to Rule 23(e)(2), "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base." Comments, Fed.R.Civ.P.23(e)(2)(A) & (B) (2018).

[3] The Court reserved ruling on certain motions including admissibility of some of defendants' expert testimony.

actions.[4] That mediation failed to resolve the case. However, the parties continued to mediate through the mediator from day to day with the trial to begin on Tuesday, November 27, 2018. The parties reached a tentative settlement on some of the important terms on November 23, 2018, and informed the Court through the mediator. The Court then continued the trial to December 17, 2018. The Parties continued to mediate with the mediator until Monday, December 10, 2018, when they confirmed additional terms and agreement as to the "Settlement Terms" signed by counsel of all Parties. The parties then undertook negotiations with respect to a final settlement agreement. Mediation, therefore, continued from day to day, including mediation at offices in Wheeling, West Virginia and at the United States District Court in Wheeling in December with the Final Settlement Agreement terms being agreed to and signed by counsel for all parties on January 30, 2019.

Settlement is Preliminarily Fair, Reasonable, and Adequate

Judicial approval of settlements is necessary to ensure that the rights of absent class members are adequately protected. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155 (4th Cir. 1991). Courts apply a two-step approach to the settlement approval process. *Smith v. Res-Care, Inc.*, 2015 WL 6479658 (S.D.W. Va. Oct. 27, 20158); *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 2d 825, 827 (E.D.N.C. 1994). In the first step, preliminary approval, the Court reviews the proposed settlement for obvious deficiencies, schedules a fairness hearing and provides the Class with notice of the proposed settlement and hearing. In the second step, the Court considers final approval of the proposed settlement at a formal fairness hearing during which arguments and evidence may be presented in support of and in opposition to the settlement. *Id.* At the later fairness hearing, the Court will be asked to consider, in an in-depth fashion, whether the proposed settlement is fair, reasonable and adequate. *Smith*, 2015 WL 6479658 at *4.

[4] As also noted in the official comments to the 2018 amendment to Rule 23(e)(2), "the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Comments, Fed.R.Civ.P.23(e)(2)(A) & (B) (2018).

Because many Circuits have established lists of numerous factors that may be relevant to determining whether a class settlement is fair, reasonable, and adequate—some or many of which "may not be relevant to a particular case or settlement proposal" and, therefore, create the potential for "distracting attention from the central concerns that inform the settlement-review process"- amendments to Rule 23(e), which were effective on December 1, 2018, "directs the parties to present the settlement to the Court in terms of a shorter list of core concerns, by focusing on the primary procedural consideration and substantive qualities that should always matter to the decision whether to approve the proposal." Comments, Fed.R.Civ.P. 23(e)(2) (2018). *See also In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* Civil Action No. 05-MD-1720 (MKB) (JO), 2019 WL 359981, at **12-26 (E.D.N.Y. January 28, 2019) (Brodie, J.).

Rule 23(e), as amended, provides in pertinent part:

(2) *Approval of the Proposal.* If the proposal would bind class members, **the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:**

(A) the class representatives and class counsel have adequately represented the class;[5]

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

[5] As noted in the official comments to the 2018 amendment to Rule 23(e)(2), "[i]f the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class." Comments, Fed.R.Civ.P. 23(e)(2)(A) & (B) (2018).

(D) the proposal treats class members equitably relative to each other.[6]

(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

Fed.R.Civ.P. 23(e) (2018) (bolded-only emphases added; footnotes added).

Applying the above factors, the Court **finds** preliminarily that the settlement is fair, reasonable, and adequate. More specifically, the Court **finds** that the class representatives and class counsel have adequately represented the class. As previously found by this Court, the experience of counsel in the area of class litigation is significant, including experience with regard to class action litigation related to oil and gas lessors' various leases and the payment of royalty in the subject jurisdiction of West Virginia. In addition to all of the findings set forth in this regard in the Court's order (Doc 400) certifying a class action for litigation purposes, the Court additionally notes that since such certification, class counsel have vigorously and thoroughly prosecuted this action by engaging in substantial and extensive discovery and by filing numerous motions, both procedural and substantive, as well as defending numerous such motions filed by the defendants. Discovery in this case was enormous and thorough, examining defendants' monetary deductions, costs, and expenses, and the defendants' background and history related to paying royalty. Class counsel and class representatives were fully prepared to try the case when it settled. As noted in the official comments to the 2018 amendment to Rule 23(e)(2), "the nature and amount of

[6] Because many Circuits have established lists of numerous factors that may be relevant to determining whether a class settlement is fair, reasonable, and adequate--some or many of which "may not be relevant to a particular case or settlement proposal" and, therefore, create the potential for "distracting attention from the central concerns that inform the settlement-review process"—the 2018 amendment to Rule 23(e)(2) "directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." Comments, Fed.R.Civ.P. 23(e)(2) (2018).

discovery in this or other cases, or the actual outcomes of the cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base." Comments, Fed.R.Civ.P.23(e)(2)(A) & (B) (2018).

The Court also **finds** that the settlement proposal was negotiated at arm's length. Negotiations did not occur in this case until after the case was prepared and ready for trial. When negotiations did occur, they were formal through mediation with an experienced mediator and constant, day to day, over two months prior to the parties reaching a final Settlement Agreement. The parties began preliminary discussions with respect to settlement after the Court ruled on pretrial motions both before and at the pretrial conference held in Wheeling, West Virginia on November 15, 2018.[7] Thereafter the parties scheduled a formal mediation in Pittsburgh, Pennsylvania to occur on November 19, 2018, before Joe Selep, an experienced trial counsel and mediator of civil actions. The mediation failed to resolve the case at that time. However, the parties continued to mediate through the mediator from day to day with the trial to begin on Tuesday, November 27, 2018. The parties reached a tentative settlement on some of the important terms on November 23, 2018, and informed the Court through the mediator. The Court then continued the trial to December 17, 2018. The partied continued to mediate with the mediator until Monday, December 10, 2018, when they confirmed additional terms and agreement as to the "Settlement Terms" signed by counsel of all parties. The parties then undertook negotiations with respect to the Final Settlement Agreement. Mediation, therefore, continued from day to day, including mediation at offices in Wheeling, West Virginia and at the United Stated District Court in Wheeling in December with the Final Settlement Agreement being agreed to and signed by counsel for all parties on January 30, 2019.

[7] The Court reserved ruling on certain motions including admissibility of some of defendants' expert testimony.

As such, the proposed settlement was reached through arm's length negotiations and was not collusive. In this regard, the Court notes that where a proposed settlement was preceded by a lengthy period of adversarial litigation involving substantial discovery, Courts are likely to conclude that settlement negotiations occurred at arm's length. Courts also find an absence of collusion when settlement negotiations are conducted by a third party. Rubestein, 4 **Newburg on Class Actions** §13:14 (5th ed.). As also noted in the official comments to the 2018 amendment to Rule 23(e)(2), "the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Comments, Fed.R.Civ.P.23(e)(2)(A) & (B) (2018).

Furthermore, the Court preliminarily finds that the relief provided for the class is adequate taking into account the substantive factors set forth in Rule 23(e)(2)(C). First, Class counsel have considered the costs, risks and delay of trial and appeal in determining the fairness, adequacy and reasonableness of the proposed settlement. Rule 23(e)(2)(C)(i) (2018). *See also Hoskins v. AB Resources, LLC*, 2014 WL 12755817 (US Dist. Ct. N.D.W. Va. 2014); *Serzone Products Liability Litigation*, 231 F.R.D. 221, 243-245 (US Dist. Court S.D. W.Va. 2005); *Smith v. Res-Care, Inc.*, 2015 WL 6479658 at *5-*7 (US Dist. Ct. S.D. W.Va.) (2015); *Jiffy Lube Securities Litigation*, 927 F.2d 155, 158-159 (4th Cir. 1991).

More specifically, the settlement takes into consideration the relative strength of the plaintiffs' case on the merits, as all of defendants' motions had been ruled upon prior to negotiation. Therefore, the strengths were well known. The defendants' defenses which plaintiffs may encounter in trial and appeal of the case were taken into consideration. There have been numerous court rulings in similar litigation in West Virginia potentially related to issues in the case. There were factual differences with respect to the liability and damages in the case. While plaintiffs believe their position to be strong, they are experienced litigators and know of the

uncertainty in the ultimate outcome of litigation at both the trial level and the appellate level. The costs extended in discovery and preparing for trial were extensive given the circumstances, as the record reflects. The potential going forward was a trial that would have lasted three weeks or more and subsequently there would be appeals from any verdict. From an appeal there exists potential for a retrial and/or changes to the amount or extent of compensation. Therefore, there exists a threat of a lesser outcome at trial or from an appeal or subsequent trial. Additionally, any appeal would involve complex legal and factual issues and, therefore, likely would take months to a year to be concluded with the possibility of a retrial being ordered which would further delay the resolution of this litigation and the receipt of any compensation to which the class members might ultimately be entitled. While there is no known threat of insolvency, the defendants have agreed to promptly fund the class settlement for substantial money which must be taken into consideration. *See id.*

Second, as to the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, the Court preliminarily notes that the plaintiffs have requested and the Court approves the reappointment of Chuck Smith and John Jenkins, and the accounting firm, Smith Cochran Hicks, PLLC, as the Class Administrator. Such individuals and the firm have extensive experience in regard to the handling and processing of class claims and the distribution of relief to the class. The Court will receive and/or hear further information and evidence concerning these matters and their effectiveness at the final approval hearing before granting such final approval. Fed.R.Civ.P. 23(e)(2)(C)(ii) (2018).

Third, as to the terms of any proposed award of attorney's fees, including timing of payment, the Court notes that Class Counsel agreed to a one-third contingency fee with recovery of costs in representing the class representatives and the class. Class Counsel therefore requests recovery of a contingency fee of one-third of recovery for the class to be paid from Settlement Funds and applied proportionately. The compensation to Class Counsel and incentive awards to

class representatives will be heard at the Final Hearing for approval of the settlement after the Court is provided with motions and objections pursuant to Fed.R.Civ.P. 23(h) & 54(d)(2). See Fed.R.Civ.P. 23(e)(2)(C)(iii) (2018).

Appointment of Notice Expert and Administrator

The Court has previously approved Shannon R. Wheatman as Class Notice Expert (Doc 497) and directed notice be sent to the class after class certification (Doc 400). The Court also appointed the Class Administrator to send notice to the class as ordered pursuant to the approved notice plan.

Pursuant to FRCP 23(c) plaintiffs request that Court to (1) reappoint Shannon R. Wheatman and Kinsella Media, LLC ("KM"); and (2) reappoint Chuck Smith and John Jenkins, and the accounting firm, Smith Cochran Hicks, PLLC, as the Class Administrator for the purpose of providing notice and information to the class concerning the settlement as ordered by the Court and as set forth in the notice plan. For reasons as stated herein, the Court Orders that Shannon Wheatman is re-appointed as Class Notice Expert and further re-appoints Chuck Smith and John Jenkins, and the accounting firm, Smith Cochran Hicks, PLLC, as the Class Administrator.

Further, Plaintiffs request the Court to approve the class settlement notice plan proposed by Shannon R. Wheatman, President of Kinsella Media, LLC("KM"), experienced experts in designing and implementing notices and programs for class actions pursuant to FRCP 23. See previously filed under seal Declaration of Shannon Wheatman, Ex. B, B-1, 2, 3, and 4, describing and explaining the form of notice, content thereof and communication plan, both mail and publication. The Court has reviwed the notice plan and the notice as proposed and finds that the plan and notice satisfies the requirements for notice and that the notice and plan represent the best notice practicable under the circumstances.

F.R.C.P. 23(c) requires that the notice for the subject class action provide the best notice practicable under the circumstances. *Amchem Products, Inc. v. Windsor*, 521 US 591, 593 (1997). Individual notices should be provided to all members who can be identified through reasonable effort. *Eisen v. Carlisle and Jacquelin*, 94 S. Ct. 2140 (1974). *Phillips Petroleum Co. v. Shutts*, 70 S. Ct. 876 (1985). The subject notice plan provides for notice by mail to all members of the class who are known. Since defendants have the names and addresses of the class members, notice will be sent by United States Mail to all known lessors who are Class members.

The defendants have previously provided the Class Administrator, subject to protective order, with the names, addresses, payment databases, and social security numbers of the lessors in order to provide for the previous Notice to the Class. Since there will be post certification changes in ownership of lessors by various means, including descent and distributions, sale and assignment, defendants will, within 10 days of the date of the order, provide an updated database, including, any new names, addresses or other data including social security numbers for the Class subject to a protective order. In addition, the Class will be provided notice by publication in newspapers across the State of West Virginia by Earned Media, wherein a nationwide press release will be distributed on P.R. Newswire's US1 news circuit reaching approximately 15,000 print and online media outlets and more than 5,400 websites, databases and online services. A nationwide press release is also being utilized to reach out-of-state lessors.

Prior to mailing the notices, the addresses will be checked against the National Change of Address ("NCOA") database, which is maintained by the United States Postal Service ("USPS.") In order to ensure the most accurate mailings possible, the Claims Administrator will certify addresses via the Coding Accuracy Support System, and verify them through Delivery Point Validation. Additionally, if available, the social security numbers of former leaseholders will be checked against the Social Security Index which is maintained by the Social Security

Administration. An heir search will be done for any former leaseholder who is deceased.[8] Notices which are returned will be re-mailed and if not delivered, will be further searched through a third-party vendor.

Further, a settlement website will be updated at the URL www.EQTRoyaltyWVClass.com to enable potential Class Members to get information about the settlement. A toll free number will be updated allowing Class Members to call and request that a Settlement Notice be mailed to them or listen to frequently asked questions. A post office box will also be established to receive Class Member requests for exclusion, as well as request for Long Form Notice or other information. The Court orders that the costs of preparing, printing, publishing, mailing and otherwise disseminating the notice shall be paid as Administrative Expenses from the EQT Guaranteed Settlement Fund in accordance with the Settlement Agreement. The Court finds that the Notices and Notice Plan, as set forth in the previously filed under seal Ex. B satisfiy the requirement of FRCP 23 and the due process requirements for the class.

The Court re-appointed the administrator, Chuck Smith and the firm of Smith Cochran and Hicks, PLLC as the Settlement Class Action Notice Administrator, to mail the notices and assure publication is performed pursuant to the Court's order and the notice plan. Also, with approval of the court, the administrator will install and manage a website for the Class Action and its members and will communicate when required, as permitted by the Court's orders and the approved notice.

The Court further orders EQT Defendants to provide to the Notice Administrator such lessor information as described above requested for use in implementing the Notice Program, including physical addresses and social security numbers (under seal) all of which are to be

[8] The deceased's name and address will be used to search a third-party address locator service for other individuals that lived at the same address at any time with the deceased.

handled by the Notice Administrator as confidential in accordance with the Court's prior protective orders.

Smith Cochran & Hicks' ("SCH"), Settlement Administrator's responsibilities shall include, but not be limited to the following: (a) establishing a post office box and toll-free phone number for purposes of communicating with Class Members; (b) establishing and maintaining a website for purposes of posting the Notices, the Settlement Agreement and related documents, for communicating with the Class and for claims processing in accordance with the Settlement Agreement; (c) accepting and maintaining documents sent from Class Members, including Claim Forms and other documents relating to claims administration; and (d) evaluating and administering claims for the allocation of the settlement funds among Class Members. The costs of administering the settlement shall be paid as Administrative Expenses from the funds contributed in accordance with the Settlement Agreement. The Class Administrator shall complete notice to the class by March 15, 2019.

Opt-Outs from Settlement Class. Class members who wish to be excluded (opt out) from the Settlement Class shall mail a written request for exclusion to the Settlement Administrator, so that it is postmarked no later than May 17, 2019. In order to constitute a valid Opt Out, a class member must affirmatively state that the class member intends to Opt Out and to be excluded from the Settlement Class, and then personally sign the form. The written request form also will contain the class member's printed name, address, telephone number, and email address (if any). Valid Opt-Outs will not be bound by the Settlement Agreement, or the Final Approval Order. Within seven days of receipt, the Settlement Administrator shall promptly provide copies of each notice of exclusion to Settlement Class Counsel and Counsel for the Defendants. Any class member who does not properly and timely mail a notice of exclusion as set forth in the Paragraphs above shall

be automatically included in the Settlement Class, and shall be bound by all the terms and provisions of the Settlement Agreement, the Class Settlement and the Final Approval Order.

Objections. Any Settlement Class Member who has not filed a notice of exclusion in the manner set forth above may object to the Settlement. Any Settlement Class Member who wishes to object to any aspect of the Settlement, including without limitation any objection to Settlement Class Counsel's Motion for Award of Attorneys' Fees, Reimbursement of Costs and Incentive Awards, must file with the Court, or as the Court otherwise may by order direct, a written statement of the objection(s). The written statement of objection(s) must include a detailed statement of the Settlement Class Member's objection(s), as well as the specific reasons, if any, for each such objection, including any evidence and legal authority the Settlement Class Member wishes to bring to the Court's attention. That written statement also will contain the Settlement Class Member's printed name, address, telephone number, a statement that the Settlement Class Member has reviewed the Settlement Class definition and has not Opted Out of the Settlement Class, and any other supporting papers, materials, or briefs the Settlement Class Member wishes the Court to consider when reviewing the objection, including information sufficient to demonstrate that the objector is otherwise a Settlement Class Member.

An objecting Settlement Class Member may appear at the Fairness Hearing in person or by counsel and may be heard, to the extent allowed by the Court, either in support of or in opposition to the fairness, reasonableness and adequacy of the Class Settlement, the dismissal with prejudice of the Defendants, the entry of final judgment as to the Defendants, and/or the Renewed Motion for Approval of Attorneys' Fees and Litigation Expenses; provided, however, that no person shall be heard in opposition to the Class Settlement, dismissal and/or entry of final judgment or the Motion for Approval of Attorneys' Fees and Litigation Expenses, and no papers or briefs submitted by or on behalf of any such person shall be accepted or considered by the Court, unless filed with

the Court on or before May 28, 2019. If a class member wished to make a personal appearance at the hearing, such person must also file with the Court a notice of such person's intention to appear on or before June 10, 2019. Settlement Class Members who object in the manner and by the dates provided herein shall be subject to the jurisdiction of this Court. Settlement Class Members who fail to object in the manner and by the dates provided herein shall be deemed to have waived and shall forever be foreclosed from raising any such objections.

A hearing on final settlement approval (the "Final Fairness Hearing") will be held on July 11, 2019 before this Court, at the United States District Court for the Northern District of West Virginia, 1125 Chapline Street, Wheeling, West Virginia.

Summary of Dates and Deadlines. Consistent with and in addition to the deadlines established in the Paragraphs above, the following deadlines shall apply to review of the proposed settlement:

Class Notice Program Commences:	Upon Entry of the Order.
Initial Class Notice Program Complete:	April 1, 2019.
Opt Out Deadline:	May 17, 2019.
Deadline for the Settlement Administrator to Tabulate and Identify Opt Outs:	May 27, 2019
Objection to Settlement:	May 28, 2019
Deadline for Filing Notice of Request for Appearance in Person at Final Hearing:	June 10, 2019
Filing of Motion and Supporting Papers for Final Approval to the Motion for Approval of Attorneys' Fees and Litigation Expenses relating to litigation Expenses and incentive awards:	June 10, 2019.
Deadline for Defendants to Exercise Right to Terminate Settlement Based Upon Opt Outs:	June 13, 2019
Final Fairness/Approval Hearing:	July 11, 2019

Dated: 2-13-2019

Approved by:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EQT PRODUCTION COMPANY, Plaintiff, v. AUSTIN CAPERTON, in his official capacity as Secretary of the West Virginia Department of Environmental Protection, Defendant.	Civil Action No. 1:18-cv-72 Judge Thomas S. Kleeh

[PROPOSED] ORDER GRANTING MOTION TO STAY BRIEFING SCHEDULE AND RULING ON DEFENDANT'S MOTION TO DISMISS

On February 15, 2019, Plaintiff EQT Production Company filed a Motion to Stay January 30, 2019 Briefing Schedule and Ruling on Defendant's Motion to Dismiss (the "Motion to Stay"), based on the pendency of a class action settlement, the final approval of which may result in EQT Production Company moving to voluntarily dismiss the Complaint for Declaratory Relief in this action. In the interests of judicial economy, and without any objection by Defendant Secretary Caperton, the Court **GRANTS** the Motion to Stay. The February 22, 2019 deadline for Secretary Caperton to file any motion under Rule 12(b) of the Federal Rules of Civil Procedure related to the Amended Complaint or any supplemental briefing in support of any pending motions is hereby stayed. Plaintiff EQT Production Company shall file a status report no later than July 19, 2019.

It is so **ORDERED**.

The Court **DIRECTS** the Clerk to transmit copies of this Order to counsel of record.

DATED: February ___, 2019.

_____
Hon. Thomas S. Kleeh
United States District Judge